

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO. 23-80101-CR-CANNON(s)

UNITED STATES OF AMERICA,

Plaintiff,

v.

**DONALD J. TRUMP,
WALTINE NAUTA, and
CARLOS DE OLIVEIRA,**

Defendants.

_____ /

**GOVERNMENT’S SUPPLEMENTAL NOTICE OF AUTHORITY IN SUPPORT OF
ITS OPPOSITION TO DONALD J. TRUMP’S MOTION TO DISMISS BASED ON THE
APPOINTMENT AND FUNDING OF THE SPECIAL COUNSEL**

Following the hearing on June 21, 2024, the Court issued an order permitting the parties to file separate notices of supplemental authority not to exceed five double-spaced pages in list or bullet form with citations but with no advocacy. ECF No. 635. This supplemental notice of authority provides additional information in response to two questions the Court posed during the June 21 hearing: (1) whether any statutes in which Congress appears to vest the appointment of officers in “the President alone, in the Courts of law, or in the Heads of Departments,” U.S. Const. art. II, § 2, cl. 2, use the term “officials”; and (2) the names of the individuals appointed as Special Counsel by Attorney General William Barr.¹

¹ Filed as exhibits to this notice are public sources confirming the appointments and explaining that the appointments were not made under the then-operative Ethics in Government Act, 28 U.S.C. §§ 591-599 (expired).

I. Statutes Vesting Appointment Power that Refer to Officials

- 6 U.S.C. § 142(a) (providing for the appointment of a “senior official” in the Department of Homeland Security to serve as a “Privacy officer”)
- 10 U.S.C. § 137a(a) (authorizing the President to appoint, with the advice and consent of the Senate, Deputy Under Secretaries of Defense, who are described as “officials”)
- 10 U.S.C. § 397 (referring to “officials” when providing for the appointment of a Principal Information Operations Advisors within the Department of Defense)
- 10 U.S.C. § 988(c) (“The term ‘covered official of the Department of Defense’ means any of the following: (A) A civilian appointed to a position in the Department of Defense by the President, by and with the advice and consent of the Senate.”)
- 16 U.S.C. § 831e (discussing “appointment of officials” and “selection of employees” for the Tennessee Valley Authority)
- 22 U.S.C. § 285a (“(a) The President shall appoint--(1) a Governor of the Bank and an alternate for the Governor--(A) by and with the advice and consent of the Senate; or (B) from among individuals serving as officials required by law to be appointed by and with the advice and consent of the Senate.”).
- 22 U.S.C. § 290g-1 (“(a) The President shall appoint a Governor, and an Alternate Governor, of the Fund--(1) by and with the advice and consent of the Senate; or (2) from among individuals serving as officials required by law to be appointed by and with the advice and consent of the Senate.”)

- 22 U.S.C. § 2651a(d) (referring to “officials of the Department of State who are otherwise authorized to be appointed by the President, by and with the advice and consent of the Senate”)
- 28 U.S.C. § 561(c) (“The President shall appoint, by and with the advice and consent of the Senate, a United States marshal for each judicial district of the United States Each United States marshal shall be an official of the Service and shall serve under the direction of the Director.”)
- 50 U.S.C. 3369d(c)(1)(A) (“Each head of an agency or department of the Government set out under subparagraph (B) shall appoint one member of the committee established by subsection (b) from among officials of such agency or department who occupy a position that is required to be appointed by the President, with the advice and consent of the Senate.”)
- 50 U.S.C. § 4306 (“The President is authorized to appoint, prescribe the duties of, and fix the salary of an official to be known as the alien property custodian”)²

In addition, the prior version of 6 U.S.C. § 458 (now providing for an Office of Counternarcotics Enforcement in the Department of Homeland Security and amended in 2004) provided:

² See also 44 U.S.C. § 2107 (notes, reflecting Pub. L. 115–426, Jan. 8, 2019, 132 Stat. 5489; as amended by Pub. L. 117–222, § 2, Dec. 5, 2022, 136 Stat. 2279, which provided that “The term ‘Government official’ means any officer or employee of the United States, including elected and appointed officials”); 28 U.S.C. § 1715(a)(1)(A) (“In this section, the term ‘appropriate Federal official’ means--(A) the Attorney General of the United States”); E.O. 12,949, Foreign Intelligence Physical Sciences (Feb. 9, 1995) (listing the Secretary of State, the Secretary of Defense, and other officers, and then stating that “None of the above officials, nor anyone officially acting in that capacity, may exercise the authority to make the above certifications, unless that official has been appointed by the President, by and with the advice and consent of the Senate”).

- The Secretary shall appoint a senior official in the Department to assume primary responsibility for coordinating policy and operations within the Department and between the Department and other Federal departments and agencies with respect to interdicting the entry of illegal drugs into the United States, and tracking and severing connections between illegal drug trafficking and terrorism.

II. Special Counsel Appointments by Attorney General Barr in 1991 and 1992

As noted at the hearing, William Barr appointed three attorneys as Special Counsel during his first term as the Attorney General. Those appointments included:

- Nicolas Bua (appointed in November 1991 to investigate the Inslaw matter)³
- Malcolm Wilkey (appointed in March 1992 to investigate the House banking matter)⁴
- Frederick Lacey (appointed in October 1992 to investigate the “Iraqgate” matter)⁵

Respectfully submitted,

JACK SMITH
Special Counsel
N.Y. Bar No. 2678084

³ See Exhibit 1 (Introduction from Special Counsel Bua Report); Exhibit 2 (Media Advisory from Senate Republican Leader Bob Dole).

⁴ See Exhibit 2 (Media Advisory from Senate Republican Leader Bob Dole); Exhibit 3 (Washington Post article).

⁵ See Exhibit 2 (Media Advisory from Senate Republican Leader Bob Dole); Exhibit 4 (Washington Post Article); Exhibit 5 (UPI Article).

By: /s/ Jay I. Bratt
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June 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which in turn serves counsel of record via transmission of Notices of Electronic Filing.

/s/ Jay I. Bratt
Jay I. Bratt